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No. 410

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Petitioner*,

v.

TRANSAMERICA CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (CA R. 10075-84)* is reported at 206 F. 2d 163.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1953 (CA R. 10085). The Petition for Certiorari was filed on October 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

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*The printed volume containing the proceedings in the Court of Appeals is cited as CA R. For the convenience of the Court, citations to other volumes of the record are preceded by the volume number. The Petition for Certiorari is cited as Pet. Transamerica's exhibits are designated TX; the Board's exhibits are designated BX.

QUESTION PRESENTED

The Court of Appeals for the Third Circuit (Judges Maris, Goodrich and Kalodner) unanimously held that in order to establish the existence of a "tendency to monopoly" violating the pre-1950 version of Section 7 of the Clayton Act, it was necessary first to determine the market area or areas of effective competition of the banks involved, and, second, to determine whether the challenged bank stock acquisitions had brought about a lessening of competition or in other ways moved Transamerica measurably toward monopoly power in the markets so determined.

The Board had found, and neither side contested the finding, that the market areas of effective competition were the local communities in which the banks were located, and the Court below accepted that determination. The Board, however, had refused to take evidence and had made no ultimate or subsidiary findings as to the effects of the acquisitions, whether measured singly or as a group, upon competition in any of these areas or as to other elements reflecting the existence or non-existence of a probable trend to monopoly power in such areas. Instead, its findings were concerned with a five state area which admittedly had no competitive significance and with statistics purporting to measure the business done by Transamerica in these five states lumped together as a single unit. The Board's order was, therefore, set aside with an express recognition that the Board might hold further proceedings to cure these defects to the extent possible.

Petitioner points to no cases in conflict with this decision. Instead, it asserts that the Court below held it necessary to establish that each of the challenged acquisitions individually exhibited a "tendency to monopoly." There was

no such holding. This issue was not before the Court of Appeals and was not in controversy.

Therefore, the question before this Court is whether it should review a unanimous ruling on a point of law by the Court of Appeals for the Third Circuit which is:

(a) clearly correct,

(b) not claimed by the Petitioner to be in conflict with any decision of this Court or of any Court of Appeals,

(c) made in the application of a Federal statute which has been superseded, and

(d) interim in character,

upon the Petitioner's contention that the opinion below can be interpreted to hold something that it did not hold, and that was not then and never has been in issue in this case.

STATEMENT

On June 24, 1948, the Board of Governors of the Federal Reserve System filed a complaint charging that Transamerica's acquisition of stock in 48 named banks violated Section 7 of the Clayton Act (1 R. 1-19). It was the first and remains the only proceeding brought under Section 7 in the Board's 35 year history (1 R. 412).

Protracted hearings were had, resulting in a printed record of 5,388 pages of testimony and 4,058 pages of exhibits. Governor Evans, a member of the Board, was assigned to act as Hearing Officer (1 R. 362). He is not a lawyer, and had no prior experience either as a hearing examiner or in the administration of the antitrust laws.

Governor Evans filed a Recommended Decision (1 R. 289) which, after briefs and oral argument, was adopted substantially verbatim by a divided Board on May 27, 1952 (1 R. 362-402). Neither the Recommended Decision nor the Board's Decision contained any authority for the conclusions reached or any discussion of the reasoning processes employed. The conclusions were merely a paraphrase of the language of the statute.

Under the terms of the Board's order, Transamerica was directed to divest itself of all its stockholdings in 47 banks in the states of California, Oregon, Washington, Nevada and Arizona (1 R. 400-01). The one bank whose stock was not ordered divested was Bank of America in which Transamerica owns not a share of stock today* and at the time of the Board's Decision held only a 5.6% interest (1 R. 371). The stock thus ordered divested is carried on Transamerica's books at $34,000,000 and amounts to 85% of its bank investments (including all interest in Transamerica's majority-owned banks) and 25% of its total assets (BX 3-W, 9 R. 6122, 6137).

Only three Governors, a minority of the full Board, voted to impose this drastic sanction upon Transamerica (1 R. 402). One of these was Governor Evans, sitting, over objection (8 R. 5702), in review of his own Recommended

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*In October, 1952, Transamerica completed the program begun in 1937 of disposing of its stock in Bank of America. In August, 1952, Mr. L. M. Giannini, the only common director between Transamerica and Bank of America, died. These events, occurring after the Decision of the Board, were raised in the Court below by Transamerica's Amended Application for Leave to Adduce Additional Evidence (CA R. 10074). See pp. 25-27 *infra*. Mr. A. P. Giannini, the founder of both Transamerica and Bank of America died during the pendency of the proceedings before the Board.

Decision. Two members did not participate in the decision (1 R. 402). The other two, one the only lawyer and the other the only professional banker voting, dissented (1 R. 402, 408).

The evidence before the Board and its findings show that Transamerica was organized in 1928 and is owned by some 140,000 stockholders, no one individual of whom holds as much as 1% of its shares (3 R. 1944). The company's assets include stock in both bank and non-bank enterprises (BX 3-W, 9 R. 6122, 6125-35) and its bank holdings, which comprise both majority and minority interests, are not confined to any one state or group of states (BX 3-W, 9 R. 6122, 6126-30). Stock in the principal majority-owned banks in issue was acquired between 1930 and 1944 (1 R. 4-6).

Of the 48 banks in issue, one is located in Arizona, 27 in California, three in Nevada, 16 in Oregon and one in Washington (1 R. 363-65). None of these 48 banks operates offices throughout the five states. On the contrary, each is required by Federal and state law to confine its offices to the state in which its principal office is located (1 R. 384). However, in each of the five states here under consideration, statewide branch banking—a system whereby a bank may operate branch offices anywhere in the state where its principal office is located—is expressly permitted and approved by Federal and state law* (TX 102, 14 R. 9309). 12 U. S. C. § 36 (1946).

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*Neither Transamerica nor any of the banks in which it owns stock may organize a new bank or open a new branch without express approval of state or Federal supervisory authorities (1 R. 398; TX 301, 14 R. 9711-9826). In considering applications for such approval, these authorities take into account, among other things, the competitive banking situation in the community where the new bank or branch

In this context, a sharply contested issue at the hearings was whether the geographical area of effective competition for commercial banking services was national in scope (1 R. 182), essentially local (6 R. 3745-46), or statewide (8 R. 5783-87).

The Hearing Officer (1 R. 315) and the Board both found that the local community is the true competitive banking area in the following language:

> "Because of the frequency of need for access to one or more of the services of commercial banks, such banks draw their business largely from areas within which customers may conveniently visit the banks as occasion may require. Thus, in this aspect of their customer relations, commercial banks are largely local, and for the usually needed customer services a distant bank cannot adequately serve a customer" (1 R. 387).

This finding was not contested in the Court of Appeals and is not contested here by Petitioner or Respondent.* It controlled the decision below and is controlling here.

Despite this finding, the Board refused to receive proffered evidence and failed to make any findings as to

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is proposed (*Ibid.*; TX 328, 14 R. 9904, TX 329, 14 R. 9905). Under the so-called "*de novo* rule," acquisition of existing banks rather than organization of new branches is favored for the development of a statewide branch banking system. This rule, enacted into statute in Oregon, Ore. Comp. Laws § 40-2103 (1940), and generally applied by the administrative authorities in the other four states here involved, requires that a bank opening a branch in a smaller community shall do so by absorbing an existing bank rather than organizing a new branch (*e.g.*, 4 R. 2691).

*The Board conceded, Brief for Respondent, p. 51, *Transamerica v. Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953), and Petitioner does not deny in this Court (Pet. 17-18), that the five states do not constitute an economically or competitively coherent market area.

the effect of the challenged acquisitions upon the competitive situation in any such local market area. The Board simply asserted that the acquisitions in issue violated Section 7 because their effect was probably to restrain trade, substantially lessen competition and tend to create a monopoly of commercial banking in the five-state area (1 R. 399). Only the "tendency to monopoly" question is preserved for review here, since the issue of probable restraint of trade was abandoned below (CA R. 10081) and that of "substantial lessening of competition" is expressly abandoned in the Petition for Certiorari (Pet. 11 n. 19).

The basis of the conclusion that Transamerica's acquisitions tended to create a monopoly was the Board's broad statistical findings. Transamerica majority-owned banks were shown to account for 6.5% of the loans, 7.0% of the deposits and 8.3% of the offices of all banks having head offices within the five-state area (TX 271, 14 R. 9611). Adding to these figures the business and locations of Bank of America, in which Transamerica held only a 5.6% interest, the Board found that the totals for the so-called Transamerica group were 49.97% for loans, 38.85% for deposits and 40.95% for offices (1 R. 399). The extraordinary significance given to Transamerica's small minority interest in Bank of America, since sold, is thus clear. Fully 85% of the business attributed to Transamerica is accounted for by the Bank of America (see TX 271, 14 R. 9611). Within the states, the percentages varied widely, ranging as low as 4 to 5% in the State of Washington (1 R. 388, 392, 393, 410).

The record shows that Transamerica made persistent and repeated efforts to put these generalized statistics in their proper setting by proving the facts as to the actual

competitive effects of the acquisitions (see 1 R. 335-51). It offered testimony of named bank officials, many from competing banks, bank customers, supervisory officials and independent economists who would have testified on competition in the markets where the banks in issue operated, and on the effect of Transamerica's stock acquisitions on that competition (*E.g.*, 4 R. 2773-2857, TX 300, 14 R. 9681-9710, TX 309, 14 R. 9874-79, TX 311, 14 R. 9880-82). This proffered evidence was rejected by the Hearing Officer (see 1 R. 335-51), who was sustained by the Board (1 R. 404), apparently in the belief that a factual examination of the effect upon competition in the competitive market areas was not required in a Section 7 proceeding.

It is hard to ascertain the Board's rationale for this view, for its Decision advances no reasoned support or basis in authority for it. From the brief of counsel before the Board and from intimations in the dissenting opinion of one of the Board members (1 R. 408), it appears that these exclusions of evidence were based on the Board's belief that the "quantitative substantiality" test, applied under Section 3 of the Act in *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949), was applicable in a case under Section 7.

This position, though abandoned by the Petitioner in this Court, was pressed before the Board and in the Court below (CA R. 10083). The Court of Appeals, however, rejected this view. While recognizing that "the avowed purpose of the Clayton Act was to supplement the Sherman Act by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act" (CA R. 10077), the Court held that the effect prohibited by the statute—whether of a single acquisition or a series of acquisitions—could only be an effect upon "the area or areas of

existing effective competition in which monopoly power might be exercised . . ." (CA R. 10082). The Court further held that even in relation to such areas, the proof could not be limited to statistical aggregates since "tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (CA R. 10083). Either of these points was, by itself, sufficient to sustain the judgment.

Since the Board had complied with neither of these requirements, and had made no findings, statistical or otherwise, relating to the relevant local areas which it had found to be the areas of effective competition, its order was set aside as inadequately supported by its findings.

The Court specifically left open the possibility of further proceedings before the Board (CA R. 10084), in which the Board would have an opportunity to present evidence, if there be any, of a tendency to monopoly in some or all of the community areas involved (CA R. 10082-83).

REASONS FOR OPPOSING THE GRANT OF THE WRIT

I.

THE QUESTION RAISED IN THE PETITION IS NOT OF THE CHARACTER SPECIFIED BY THE RULES OF THIS COURT AS APPROPRIATE FOR REVIEW HERE ON WRIT OF CERTIORARI

A. The Court below correctly decided that a "tendency to monopoly" violating Section 7 of the Clayton Act can only be found on the basis of a factual analysis of competitive conditions within a market area and that such a market area must be shown to be an area of effective competition.

The Petitioner's interpretation of the decision below is incorrect (Pet. 3, 14). The Court of Appeals did *not* hold

that a tendency to monopoly under Section 7 could not be shown by an examination of the cumulative impact of a series of acquisitions, absent a showing as to the effect of each stock acquisition. Petitioner's frequent references to this asserted holding are not supported by any citation to the opinion below (Pet. 3, 14, 18, 19). This holding which, it asserts, is the "one issue" which it "asks this Court to review" (Pet. 14), is not the holding of the case.

The Court of Appeals never addressed itself to that issue. Nor could it have, for the question was never in controversy between Transamerica and the Board. Transamerica has never denied that the tendency to monopoly prohibited by Section 7 of the Clayton Act might be demonstrated by showing the aggregate competitive consequences of a series of acquisitions, even though the prohibited tendency might not appear in all the acquisitions, individually considered.

What Transamerica did contend, and what the Court below held, was that before there could be any showing of the impact of acquisitions for the purposes of the Section, whether of an individual acquisition or a series of them, the Board must first define a market area within which a competitive effect might be observed, *i.e.*, "the area of effective competition." *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 299-300 n. 5 (1949) (CA R. 10082). It was the absence of any attempt on the part of the Board to relate its evidence to any area of effective competition, that the Court of Appeals "particularly stressed" as erroneous in setting aside the Board's order (Pet. 2).

In the face of this Court's decisions, it is hard to see how the Court of Appeals could do otherwise. In opinion after opinion dealing with the problems of monopoly, this

Court has emphasized that the necessary threshold problem is to define the market in which the alleged monopoly operates. *E.g., United States* v. *Columbia Steel Co.*, 334 U. S. 495, 512, 516, 520 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-68, 172-73 (1948); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610-12 (1953); see *Standard Oil Co. of Calif.* v. *United States, supra*, at 299-300 n. 5. This is a necessary result of the Court's well-established definition of monopoly as market power, the power arbitrarily to control prices and exclude competitors in a market. *E.g., American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *Griffith*, 334 U. S. 100, 107 (1948).

The parties are agreed that the Court below was correct when it said "it was not necessary for the Board to find that Transamerica has actually achieved monopoly power" (CA R. 10082). But to speak of tendency to monopoly—that is, an approach towards a position of market power—without reference to the market framework which is fundamental to the concept of monopoly, is to divorce the discussion from all relation to reality.*

The deficiency in the Board's decision is that the statistical aggregations upon which it is based did not reveal percentage of occupancy or approaching market control in

*Even the Petitioner is unable to dissociate tendency to monopoly from the market concept. The Petitioner itself asserts that there was a "corresponding decline *in the share of the market* held by non-Transamerica banks," and that Transamerica had "captured 40% *of a market* . . ." (Pet. 16). The very passage from the legislative history of the amended Section 7 upon which the Petitioner relies states that "*control of the market* . . . may be achieved not in a single acquisition but as a result of a series of acquisitions" (Pet. 15) (Emphasis supplied).

any of the markets as defined by the Board itself. There is no controversy about this point. The Board itself, before the Court of Appeals, and the Petitioner here, concede that the five states involved do not constitute a market. See p. 6 n. *supra*. Indeed, as Judge Maris said, the concept of a five-state market "flies in the face of [the Board's] own finding that the local community is the true competitive banking area" (CA R. 10082).

Nor is there any validity to the Petitioner's apparent suggestion that tendency to monopoly in all the constituent markets may be inferred from the figures aggregrated for the five states (Pet. 18). In the first place, Transamerica was not permitted to rebut any such inference. Evidence to show absence of any tendency to monopoly in various individual communities was consistently excluded by the Board (see, *e.g.*, 7 R. 4474-78, 4480-85, TX 300, 14 R. 9681-9709; and see generally Brief for Petitioners, pp. 45-53, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953)). Moreover, any such inference is at variance with the record, for it is clear from the fragmentary evidence that does appear there that wide variations would be found between community markets (see generally BX 16, 10 R. 6855-6955; TX 303, 14 R. 9830-67).

The necessity, in any rational administration of the Clayton Act, for the evidence of tendency to monopoly to be related to the market area as defined may be illustrated by a simple example. If the Board had included the acquisition by Transamerica of its 7% stock interest in National City Bank of New York (Pet. 5 n. 5) in the violations charged in its complaint, then, on its theory, the loans, deposits and offices of all the banks in the State of New York would have to be added to the totals against which the percentage share

of the so-called "Transamerica group" was measured. This simple change in the complaint could not alter the actual tendency or lack of tendency of Transamerica to a monopoly in the community markets which its banks serve. Yet such a change, obviously, would have led to a drastic shrinkage in the percentages attributed to Transamerica in the Board's findings.

The fallacy of the Board's position may be demonstrated in yet another way—by considering the character of the relief which it permits. The present case provides a good example. The Board has ordered the divestiture of $34,000,000 of shares in 47 banks. In each of two states, Arizona and Washington, Transamerica owns only one bank (1 R. 365). The mere substitution of another owner of these banks for Transamerica, which is all the Board's order would accomplish, could not affect the competitive situation in these two states at all. In fact, there are only ten community markets in the entire five states where this vast and drastic dislocation of Transamerica's affairs could possibly affect by one iota the competitive situation.* Any view of the law which can lead to such a necessarily futile and arbitrary exercise of administrative power must fall of its own weight. *Cf. United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-75 (1948).

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*In only ten of the communities was Transamerica found to control more than one bank, so that only in those ten communities is there even a possible basis for an inference that some change in the competitive picture would result from the divestiture ordered (CA R. 10080). Evidence of the effect of such control in these ten communities was not taken (*ibid.*). In any event, in nine of these communities the second bank is a Bank of America branch (5 R. 3123-61), and the question of Transamerica's control of this institution must in any event remain open in the light of events occurring since the Board's decision. See pp. 25-27, *infra*.

The Court of Appeals holding that "tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statute may be invoked" (CA R. 10083) is equally clearly correct and in accord with the well-established precedents. *International Shoe Co.* v. *FTC*, 280 U. S. 291 (1930); *V. Vivaudou, Inc.* v. *FTC*, 54 F. 2d 273 (2d Cir. 1931); *Aluminum Co. of Am.* v. *FTC*, 284 Fed. 401 (3rd Cir. 1922); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935); *United States* v. *Standard Oil Co. of N. J.*, 47 F. 2d 288 (E. D. Mo. 1931); *cf. Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (2d Cir. 1945). *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), in which the Court said it was applying the policies of Section 7, *id.* at 507 n. 7, is only the most explicit of a number of cases in this Court and Courts of Appeals emphasizing the empirical character of the analysis required to establish monopoly or tendency to monopoly. In that case the Court said:

> "The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.* at 528.

The clear import of these and other cases is that, though the percentage figures, if properly related to a competitive market, may in the end turn out to be persuasive, neither the enforcing agency nor the reviewing court may hold them to be decisive without at least receiving and considering evidence of other competitive factors. In this case, not only did the Board fail to pursue such an investigation of its own

motion, but it also refused to permit Transamerica to introduce evidence on these other factors qualifying the significance of the percentage figures.

In the Court below, the Board was at least logically consistent, for it defended this refusal on the authority of *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949), where broad exclusions were sustained by this Court in a proceeding under a wholly different Section of the Clayton Act. The Petitioner, before this Court, has abandoned this position and advances no justification whatever for the wholesale refusal to take evidence on business and competitive facts to illuminate the meaning of the percentage statistics.

At most, the Petitioner here might contend that the Board's findings would support an inference of violation of the statute. Surely that inference is open to rebuttal, however. Yet every attempt by Transamerica to rebut the inference by direct evidence of competitive effects in the markets concerned was thwarted by the exclusionary rulings of the Board, as the Board itself admitted below. Brief for Respondent, pp. 43-44, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953). Thus on the Petitioner's own theory, the case cannot finally be determined against Transamerica without a remand to the Board to take this evidence. For that reason alone, the case is not a proper one for review here.

The same observation serves to dispose of Petitioner's reliance on the asserted finding that Transamerica had the power to suppress potential competition (Pet. 3, 10, 18). The Board made no such finding. It did say that "as the size and resources of a banking group increase, its power

to suppress potential competition increases" (1 R. 398). Not only is this finding internally inconsistent,* but it studiously avoids a determination that Transamerica had such power. And well it might, for on this issue again, the Board expressly refused to permit Transamerica to introduce evidence refuting the existence or approach of power to suppress potential competition. For example, Transamerica was prevented from showing that entry into the banking business throughout the five states under consideration was substantially freer than in other sections of the country (*E.g.*, TX 250, 14 R. 9486-89; see 5 R. 3112-18). There are wholesale exclusions of direct testimony of local businessmen and bankers proffered on the point in issue (TX 300, 14 R. 9681; TX 309, 14 R. 9874; TX 311, 14 R. 9980).

There is only one factual matter bearing on tendency to monopoly on which the record does throw some light, and it goes to negative any such tendency. That factor is the effect of the acquisitions on competition between the acquired banks. This, as the Court below said, "is clearly relevant in the determination of the existence of a tendency to monopolize" (CA R. 10082), although it was careful not to say that it is controlling. That this is so seems too patent for argument. Yet on this one point of factual com-

*The board asserts that a large banking organization can "enter a community before it is clearly apparent that a bank is warranted" and pre-empt favorable locations. It is difficult to see how this is possible when, in the same paragraph, it states, "Authorization must first be secured from regulatory agencies before new banks or branches may be established," and that such authorization is based, among other things, on "the effect of such establishment upon existing banks and the availability of business to support the new bank and permit its successful operation" (1 R. 398).

petitive significance, it appears on the face of the record that there was no lessening of competition between the banks as to 38 of the acquisitions and no showing of any lessening as to the other ten (CA R. 10080). So convincing is Judge Maris' analysis on this point (CA R. 10079-81), that the Acting Solicitor General has abandoned the contrary contention in his Petition here.

Finally, the Petitioner's complaint that the decision below makes it impossible for the Board to proceed against Transamerica or other bank holding companies (Pet. 20-21) is equally without merit. The Court of Appeals itself disposed of this suggestion:

> "We, of course, do not hold that no tendency to monopoly by Transamerica in commercial banking could be shown in any of the competitive areas in which its acquired banks operate. It may well be that in some of these areas Transamerica through the acquisition of banks has brought about a substantial lessening in competition and in that and other ways has moved measurably toward monopoly power in those particular areas. The Board has made no such findings, however, nor has it made appropriate supporting findings as to the factors which an analysis of the market would disclose to be relevant to the determination of these questions" (CA R. 10082-83).

See also Adelman, *Acquire the Whole or Any Part of the Stock or Assets of Another Corporation,* Proceedings ABA Section of Antitrust Law, August 26-27, 1953, p. 111, 114.

The fact of the matter is that this is the only case the Board has ever brought under Section 7 of the Clayton Act as it existed prior to the amendment, and if, in the

future, it desires to proceed against bank holding companies, it has available the new statute establishing quite different prohibitions. See pp. 19-22 *infra*. The decision below does not frustrate the Board's enforcement of the Congressional mandate even under the old statute, applicable here. What Petitioner is really complaining of is the Court's insistence that the Board confine its exercise of authority within the limitations laid down by that statute. A tendency to monopoly can only exist in a defined market area; and the Court below rightly refused to permit the Board to substitute its predilections about "bigness" for the prescribed statutory standards to be applied in accordance with well-established rules and procedures.

B. The decision below is not in conflict with applicable decisions of this Court or with other decisions of Courts of Appeals on the same matter.

It has already been demonstrated in Part A above that the decision below accords fully with the governing precedents from this Court both in requiring definition of the market, see p. 10-11 *supra*, and in requiring factual evidence of a prohibited tendency within the market. See p. 14 *supra*.

As to the appellate decisions construing Section 7, the Court of Appeals for the Third Circuit has rendered nearly half of them, more than any other appellate court in the country. *Pennsylvania R. Co.* v. *ICC*, 66 F. 2d 37 (3d Cir. 1933), *affirmed by an equally divided Court*, 291 U. S. 651 (1934); *Temple Anthracite Coal Co.* v. *FTC*, 51 F. 2d 656 (3rd Cir. 1931); *Thatcher Mfg. Co.* v. *FTC*, 5 F. 2d 615 (3rd Cir. 1925), *reversed in part, on other grounds*, 272 U. S. 554, 560 (1926); *Aluminum Co. of Am.* v. *FTC*, 284 Fed. 401 (3rd Cir. 1922), *cert. denied*, 261 U. S. 616

(1923). The Court below relied squarely upon the prior appellate decisions (CA R. 10080, 10083), and the Petitioner apparently recognizes their continuing force (Pet. 20). It seeks to distinguish them, however, on the ground that they deal with acquisitions of manufacturing companies rather than banking companies (*ibid.*), surely a tenuous point of difference. If anything, stock acquisitions involving "industrial firms which competitively invade market areas far from their home offices" (*ibid.*) would seem far more likely to fall afoul of the Clayton Act than acquisition involving banks, which the Board found to compete primarily in local markets.

C. The decision below does not involve a question of general importance, since the statute which it construed has been superseded.

The complaint in this case was filed, the hearings held, the order made, and the appeal argued and decided all under Section 7 as it existed prior to the Act of December 29, 1950, 64 Stat. 1125, 15 U. S. C. § 18 (Supp. V 1952). The new Section, now three years old, will be the governing statute for future actions brought by the Board and other enforcing agencies of the Clayton Act.

The new Act, the end result of intensive Congressional consideration beginning in 1945, drastically revised the entire Section. The committee hearings, investigation, study and debate over the five year period became the vehicle for a thoroughgoing reassessment of Congressional policy towards inter-corporate mergers and stock acquisitions.

A review of this legislative history makes it perfectly clear that Congress meant to strengthen the prohibitions against corporate amalgamation, whether by stock acquisitions or otherwise. Contrary to Petitioner's assertion (Pet.

3 n. 1, 15-16), this change was applicable equally to the "substantial lessening" and "tendency to monopoly" clauses of the revised statute. The Senate Report specifically indicated those portions of the old Section 7 that were to be carried over without change. S. Rep. 1775, 81st Cong., 2d Sess. 6 (1950). No such indication appears as to the "tendency to monopoly" portion of the old Section. Instead the Report expressly states:

> "it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained [*i. e.*, 'substantial lessening' and 'tendency to monopoly'] than has been given in the past." *Id.* at 4. See also H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).*

If the Court should grant review of this case and decide in favor of Transamerica, it would necessarily leave open for future decision the question of the effect to be given this portion of the legislative history in the administration of the new Section 7.

On the other hand, if the Court should decide against Transamerica on the present record, it must hold, at least implicitly, that direct factual evidence of competitive effect in the relevant markets may be excluded by blanket rulings in proceedings under the old Section 7. Such a holding could provide no assistance in the administration of the re-

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*See *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 741 (2d Cir. 1953); Carson, *Corporate Mergers*, CCH Antitrust Law Symposium 167 (1952); Montague, *The Celler Anti-Merger Act*, 37 A. B. A. J. 253 (1951); Celler, *The New Anti Merger Statute*, *id.* at 897, 900; Note, 64 Harv. L. Rev. 1212 (1951).

vised Section, for it would not give any force to the clear Congressional expectation that henceforth, the prohibited effects were to be demonstratd by factual analysis of the competitive structure of the market.

> "It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition." S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). See also H. R. Rep. No. 1191, 81st Cong., 1st Sess. 6-8 (1949).*

It is apparent that whatever decision the Court might make in this case, it would remain open to counsel in future litigation before the Federal Trade Commission or the lower courts to urge that the statutory change calls for a different result. Indeed, neither the Federal Trade Commission nor the Antitrust Division of the Department of Justice, the two agencies principally responsible for the enforcement of Section 7 and best acquainted with the legal and policy problems involved, has had any part in the preparation or trial of this case. The orderly development of the new statute can best be promoted by deferring consideration of these issues of law and statutory construction by this Court until a case is presented which arises under and is oriented toward that statute, and where the views of the principal enforcing agencies are fully developed for the Court.

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*See also Adelman, *Acquire the Whole or Any Part of the Stock or Assets of Another Corporation,* Proceedings ABA Section of Antitrust Law, Aug. 26-27, 1953, p. 111, 117-23; Note, 64 Harv. L. Rev. 1212 (1951).

II.

THE CASE DOES NOT COME TO THIS COURT IN A POSTURE APPROPRIATE FOR REVIEW.

A. There are numerous other points supporting the judgment below which would be argued by Respondent and would have to be considered by this Court if certiorari should be granted.

The "tendency to monopoly" issue on which the Petitioner seeks review of the decision below does not arise on this record as an isolated question dispositive of the case. Indeed it is only one of several points, all supporting the result below, which would have to be urged here if certiorari should be granted. These include:

(1) the absence of power in the Board, under Sections 7 and 11 of the Clayton Act, to bring this proceeding (CA R. 10061);

(2) the refusal of the Board to admit evidence clearly relevant to the determination of the "line of commerce" or functional market involved, of competition by insurance companies, savings and loan associations, finance companies, government lending and depositary agencies and other non-bank institutions in providing lending and depositary services (CA R. 10064);

(3) the improper standards which governed the calculations by which the Board arrived at the statistical percentages in its findings (CA R. 10065);

(4) the repeated arbitrary and inconsistent rulings of the Hearing Officer, sustained by the Board, which amounted to a denial of a fair hearing to Transamerica, and were expressly stated by two of the five Board mem-

bers voting to have denied Transamerica its "day in court" (*Ibid.*);

(5) the lack of constitutional due process, in proceedings contemplating an ultimate judicial decree, in that compulsory process by subpoena or otherwise was not available for the production of witnesses and evidence (CA R. 10065-66);

(5) the excessive and inappropriate character of the relief granted. See Brief for Petitioner, p. 74, Reply Brief for Petitioner, p. 6, *Transamerica Corp.* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (3rd Cir. 1953).

All of these points were specified as error, briefed to the Court below and are fully preserved here. A number of them require elaborate analysis of the 14 volume record, in which this Court would not have the assistance of prior consideration by the Court of Appeals, which properly found it unnecessary, in the view it took of the case, to pass on most of them (CA R. 10084).

There are two other questions remaining at large, which deserve special mention here because of their immediate bearing on the issue of granting the writ.

B. The decision of the Board does not meet the minimum standards prescribed by this Court for Findings of Fact and Conclusions of Administrative Tribunals.

The Board's Decision does not disclose the reasoned relation of legal rules to the facts found which distinguishes quasi-judicial decision from administrative fiat, and which has been found necessary by this Court to a proper review of decisions of administrative agencies. Only a few short months ago, the Court said:

> "While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 81 (1953).

Just such inability to understand what really lies behind the Board's conclusions appears in this case. The Board in its Decision did not make the slightest effort to reveal the standards which it thought it was applying or how they related to the facts which it found. For all that appears in the Decision, it would not have changed matters if the critical percentages had been 30 or 20 or even 10%, instead of the 40% found by the Board.

The Board sought to supply such a rationale for the first time in its brief to the Court of Appeals, and the Acting Solicitor General has suggested a wholly different rationale in his Petition for Certiorari. But these do not cure the defect:

> "In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. [Citations] We must know what a decision means before the duty becomes ours to say whether it is right or wrong." Cardozo, J., in *United States* v. *Chicago*

M., St. P., & P. R. Co., 294 U. S. 499, 510-11 (1935).

Accord: *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196-97 (1947); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943); *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-89 (1942); *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86-87 (1930). *Cf. Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940) and cases cited; *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 480 (1952) (Jackson, J., dissenting).

C. Any decision this Court might make on this record would require remand to the Board for reconsideration of its central finding that Transamerica controls Bank of America, in view of the new facts raised by Transamerica's petition to adduce additional testimony.

If the Court were to sustain the Board on every contention made by the Petitioner in its brief, it still could not finally dispose of this controversy. It has already been pointed out that, without the business of Bank of America, the percentages attributed by the Board to Transamerica would shrink to almost minuscule proportions. See p. 7 *supra*. The Board's Solicitor repeatedly conceded that without Bank of America he had no case at all (*E.g.*, 2 R. 1329-30). Thus the Board's finding that Bank of America was controlled by Transamerica is a necessary prerequisite of the order, even on the Board's own view of the case.

Transamerica, of course, contested the control issue before the Board (see, *e.g.*, 1 R. 348, 356). Although it continues to believe that the finding was incorrect upon the record before the Board, it is no longer necessary to inquire whether that finding is supported by evidence on the record

as a whole. See *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951). Subsequent events have completely changed the picture as the Board saw it or could reasonably contemplate it at the time it issued its Decision. Among these events are the disposal of the last remaining shares of Bank of America stock by Transamerica; the death of Mr. L. M. Giannini, one of the foundations of the Board's control finding and the last link between the Board of Directors of Transamerica and Bank of America; the elimination of all common officers or directors between Bank of America on the one hand and Transamerica and its subsidiary banks on the other; the installation of a new President and Chairman of the Board of Transamerica.*

Certainly it is not for this Court or the Petitioner to say how the Board would view the impact of these events upon the control relationship which it found. See *NLRB* v. *Indiana & Mich. Elec. Co.,* 318 U. S. 9 (1943). They are serious and pervasive enough to require complete reconsideration of that finding. If the Board should conclude, in the light of these facts, that the asserted control relationship had been terminated, the Board's entire case would fall. At the very least, the drastic character and scope of the relief ordered would have to be revised. In the light of these possibilities it becomes apparent that any decision rendered by the Court in this case may well turn out to be academic

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*Some of these events have occurred even later than the filing of the Application to Adduce Additional Evidence in the Court below (CA R. 10074). These later events could, of course, be brought to the attention of this Court by an amendment to the Application. The Court of Appeals specifically noted that the matters mentioned in the Application could be raised upon further proceedings before the Board (CA R. 10084).

and purely advisory, and without any relation to the disposition of the controversy.

Since all the questions now urged by the Petitioner will be preserved for this Court on review of the proceedings before the Board, if any, on remand from the Court of Appeals, there is no reason which should move the Court to grant review of this case at this premature stage.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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